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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARIO LUDMER,

Respondent,

vs.

MAURICE A. NERNBERG, JR.,

Petitioner.

BRIEF OF RESPONDENT, MARIO LUDMER, IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IS THERE ANY MERIT WHATSOEVER TO PETITIONER'S CLAIM THAT THERE WAS A RETROACTIVE APPLICATION OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT?

II. IF THERE IS ANY MERIT WHATSOEVER TO THE CLAIM OF THE PETITIONER THAT THERE WAS RETROACTIVE APPLICATION OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT, DID THE PETITIONER FAIL TO FILE HIS PETITION FOR WRIT OF CERTIORARI WITHIN THE APPROPRIATE TIME LIMITATIONS PERMITTING THE FILING OF SAID PETITIONS?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption of the within Brief of Respondent, Mario Ludmer, in Opposition to Petitioner's Petition for Writ of Certiorari.

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STATEMENT OF JURISDICTION

Respondent does not believe that this Honorable Court has jurisdiction in this matter because of the applicable provisions of 28 U.S.C.A. §2101 and 2104.

STATEMENT OF THE CASE

This matter comes before the Court on the Petition for Writ of Certiorari filed by the Petitioner Maurice A. Nernberg, Jr. (Nernberg), an attorney who is licensed to practice law in the Commonwealth of Pennsylvania and who maintains his offices in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania.

So that the Court will understand the nature of the entire matter, which has been going on for some sixteen (16) years in the several courts of the Commonwealth of Pennsylvania, a detailed statement of the facts is necessary, especially where the facts stated by the Petitioner beginning on page 5 of his Petition do not correctly set forth what occurred.

One Margaret O'Toole was injured in a vehicular accident which occurred on February 9, 1975 in Allegheny County, Pennsylvania. As a result of those injuries, she was taken by ambulance to the North Hills Passavant Hospital, where she came under the care of Dr. Mario Ludmer, a board certified neurosurgeon, because of injuries to her head and neck regions. During the six (6) days that Mrs. O'Toole remained in the hospital, Dr. Ludmer treated her. Following her discharge from

the hospital, Mrs. O'Toole remained under the care of Dr. Ludmer until on or about March 6, 1975, at which time the office notes of Dr. Ludmer revealed that she was feeling quite good and that it was only necessary for her to return to see him if she had additional problems. Mrs. O'Toole never returned to see Dr. Ludmer after March 6, 1975, some four (4) weeks following the happening of the vehicular accident.

Initial counsel for Mrs. O'Toole in the vehicular accident claim, one Paul E. Moses, Esquire, requested a report from Dr. Ludmer using a form which the attorney supplied; Dr. Ludmer completed this form based upon his records and based upon his examinations and evaluations of Mrs. O'Toole, and he forwarded same to the initial attorney.

Subsequently, this sometime in 1977, an exact date not known as the Power of Attorney forming part of Attorney Nernberg's file was not dated, Mrs. O'Toole retained Nernberg to represent her in a claim for damages for personal injuries allegedly sustained in the aforementioned vehicular accident. Nonetheless, in September of 1977, at the request of Nernberg, a conference was held between Dr. Ludmer and Nernberg at Dr. Ludmer's offices, Mrs. O'Toole being present. At that time, based upon the testimony of Dr. Ludmer during

the trial in his claim against Nernberg, it was revealed that Attorney Nernberg wanted Dr. Ludmer to "send a new report" stating that Mrs. O'Toole would have had residual difficulties as a result of injuries sustained in the accident. Dr. Ludmer refused to send such a report as his records were not consistent with that statement. (It is to be noted that Nernberg, in his Petition to this Court, claimed that Dr. Ludmer billed Nernberg for a report, that Nernberg paid the bill, and never received the promised report; this is a fabrication by Nernberg as the testimony reflected that there was no contractual obligation or agreement between Nernberg and Dr. Ludmer calling for a report, and that the sum in the amount of $100.00, which had been paid by Nernberg to Dr. Ludmer, was for the conference in September of 1977 at Dr. Ludmer's offices, and nothing else. (See Respondent's Appendix 1a.)

The claim on behalf of Mrs. O'Toole was scheduled for trial in the Court of Common Pleas of Allegheny County, Pennsylvania, to commence on or about October 9, 1978. Sometime in September of 1978, Dr. Ludmer was served with a subpoena by the offices of Nernberg directing Dr. Ludmer to appear to testify at the time of the trial of Mrs. O'Toole. At that point, Dr. Ludmer contacted present counsel

for Dr. Ludmer, Seymour A. Sikov, Esquire, and requested that Attorney Sikov accompany him to the trial in view of repeated harassing letters and phone calls between September of 1977 and September of 1978 from Nernberg to Dr. Ludmer about Dr. Ludmer's alleged failure to supply Nernberg with "a new report" to include statements which were not true, Dr. Ludmer refusing to so do. Nernberg was advised by Attorney Sikov that Dr. Ludmer was prepared to appear to testify on behalf of Mrs. O'Toole and, in fact, on the day that Dr. Ludmer was scheduled to appear, he appeared on the 7th Floor of the Court of Common Pleas of Allegheny County, Pennsylvania, at the courtroom of Judge S. Louis Farino, this at or about 1:15 p.m. on October 10, 1978; at that time, Dr. Ludmer was advised by Court personnel that the claim of Mrs. O'Toole had been settled amicably by she and her attorneys that morning. (It is to be noted that on page 6 and page 7 of Nernberg's Petition he has made misrepresentations regarding the willingness of Dr. Ludmer to appear to testify, these being untrue statements and were testified to as being untrue by Dr. Ludmer in the claim of Mario Ludmer vs. Maurice A. Nernberg, Jr. at GD No. 79-6085 in the offices of the Prothonotary of Allegheny County, Pennsylvania. Further, there has never been any testimony permitted in the trial Court

as to any evaluation of the claims of Mrs. O'Toole arising as a result of the vehicular accident of February 9, 1975, and the figures set forth on page 7 of Nernberg's Petition are, once again, misrepresentations of the facts. Perhaps, Nernberg and Mrs. O'Toole "would have liked" to receive a settlement or verdict of $20,000.00, but no one has ever testified or agreed that said sum was the value of Mrs. O'Toole's claim. It was settled for $8,000.00 at the time of trial.

On March 5, 1979, Nernberg initiated an action against Dr. Ludmer by the filing of a Writ of Summons in Trespass in the offices of the Prothonotary of Allegheny County, Pennsylvania, serving same upon Dr. Ludmer. (See Respondent's Appendix 2a). At that time, Dr. Ludmer again retained present counsel of record to represent him in defense of the claim.

Eventually, this on July 2, 1979, the deposition of Dr. Ludmer was taken by Attorney Nernberg representing himself, present counsel for Dr. Ludmer taking the depositions of Nernberg and Mrs. O'Toole. It is to be noted that Mrs. O'Toole testified during that deposition as follows:

> 1) That she did not know of the filing of the underlying action by the Defendant against the Plaintiff at the time it was filed or until some three or four months later;

2) That had she been consulted concerning same, she would not have joined as a party Plaintiff;

3) That she did not desire to be part of any such action;

4) That she did not consent to the filing of the action;

5) That she had no claim against Dr. Ludmer; and

6) That she was never asked by Nernberg to be a party to his action.

Subsequent to the taking of the aforementioned depositions, this on July 12, 1979, Nernberg filed a "Complaint in Assumpsit" (See Respondent's Appendix 3a) against Dr. Ludmer demanding, inter alia, damages in the amount of $3,400.00 from Dr. Ludmer for alleged breach of contract and alleged intentional interference by Dr. Ludmer with Nernberg's relationship with Mrs. O'Toole. (The Court's attention is invited to the fact that "where the figure of $3,400.00 came from" was never brought out in any testimony whatsoever; Attorney Nernberg testified that Mrs. O'Toole's case settled for $8,000.00 and that he reduced his contingent fee to $1,400.00 to settle the claim. See Respondent's Appendix 4a).

After the pleadings were complete, and based upon the deposition testimony and based upon the case law of the

Commonwealth of Pennsylvania, Ludmer moved for a summary judgment in his favor in the claim brought against him by Nernberg, which judgment was granted in the lower court and affirmed in the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania denying allocatur on September 14, 1983.

On July 9, 1984, because Dr. Ludmer had been put to considerable expense and had suffered considerable emotional distress because of the allegations brought against him by Nernberg and because Nernberg persisted in filing two appeals to the appellate courts from the granting of Dr. Ludmer's Motion for Summary Judgment in Nernberg's lawsuit against him, Dr. Ludmer brought an action against Nernberg pursuant to the Wrongful Use of Civil Proceedings statute of the Commonwealth of Pennsylvania. This action was filed at No. G.D. 84-11881 in the office of the Prothonotary of Allegheny County, Pittsburgh, Pennsylvania. Preliminary Objections to the Complaint were filed by Attorney Nernberg, the Court of Common Pleas of Allegheny County, Pennsylvania, the Honorable Bernard J. McGowan presiding, sustaining the Preliminary Objections. The Superior Court of Pennsylvania, in a Memorandum Opinion, reversed the Order of the Court of Common Pleas of Allegheny County and remanded the matter

for further proceeding. This Court found that, based upon the provisions of the Wrongful Use of Civil Proceedings statute, Dr. Ludmer had properly averred an appropriate action. With regard to the issue which Nernberg appears to be raising with this Court, namely, that there was retroactive application of the Wrongful Use of Civil Proceedings Act, the Superior Court found that the Act of 1980 contemplated and covered not only the "initiation" of civil process against someone, but also the wrongful "continuation" thereof as grounds for the application of said Act.

Attorney Nernberg then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which Petition was granted, the Supreme Court, by Opinion dated February 3, 1989, affirming the decision of the Superior Court of Pennsylvania holding that, because Nernberg continued to prosecute his action against Dr. Ludmer after the effective date of the 1980 Act, the cause of action "did not accrue" until all the requirements of the Act had been met which included obtaining of a favorable outcome, which finally occurred on February 3, 1989, and, therefore, Nernberg was subject to an action for wrongful use of civil proceedings. (The Court's attention is invited to the Opinion of the Honorable Justice Stephen Zappala set forth on pages 24a through 48a

of Petitioner's Petition. Rather than reiterate to this Court the logic used by the Supreme Court of Pennsylvania, I invite this Court's attention to pages 28a through 35a wherein the Supreme Court of Pennsylvania specifically deals with the questions now being presented for review to this Court by Petitioner.)

It is to be noted that, although Attorney Nernberg filed the lawsuit against Dr. Ludmer in 1979, his appeal to the Superior Court of Pennsylvania was filed on June 5, 1981, this after the effective date of the Wrongful Use of Civil Proceedings Act, and his Petition for Allowance of Appeal to the Supreme Court was filed in May of 1983. Attorney Nernberg was well aware of the provisions of the Wrongful Use of Civil Proceedings Act, which became effective on February 19, 1981, at the time he filed each of these appeals; accordingly, he should not now be heard to claim that the provisions of the Act were retroactive.

In November of 1992, the claim of Dr. Ludmer finally came to trial before the Honorable Gerard M. Bigley, Judge of the Court of Common Pleas of Allegheny County, the jury, after two (2) weeks of trial, and after the presentation of substantial evidence, this to include testimony by expert witnesses presented by both Dr. Ludmer and

Attorney Nernberg, found in favor of Dr. Ludmer and against Nernberg in the amount of $25,000.00 of compensatory damages and $50,000.00 punitive damages.

As is apparent from Petitioner's Petition, once again, Nernberg filed appeals from the jury verdicts, the Superior Court of Pennsylvania affirming the denial of Nernberg's Motion for Post Trial Relief, the Supreme Court of Pennsylvania denying Nernberg's Petition for Allowance of Appeal. Although Nernberg filed a Petition for Reconsideration of the Denial of Allowance of Appeal, the Supreme Court of Pennsylvania on October 24, 1995 denied the Petition for Reconsideration.

It was not until November of 1995 that payment of the verdict, plus interest, was finally made by the surety company from which Nernberg had purchased an appeal bond. After the Supreme Court of Pennsylvania denied Nernberg's Petition for Allowance of Appeal on July 21, 1995, action was taken pursuant to the Rules of the Court of Common Pleas of Allegheny County, Pennsylvania, to obtain payment of the verdict plus interest from the surety. Nernberg filed an appeal from an Order of Court dated October 31, 1995, the Honorable Judge Bigley presiding, he being the original Trial Judge, directing the bonding

company to forthwith pay the verdict plus interest and costs to Dr. Ludmer, which payment has been made and the sums have been distributed to the parties entitled to same.

It is to be noted that Nernberg again filed papers in the nature of an Emergency Application for Special Relief, this with the lower court, as well as with the Supreme Court of Pennsylvania. Both courts denied the Motion, the Supreme Court remanding the record back to the Trial Judge, Judge Bigley, who was to hold a hearing on the assessment of legal fees and expenses against Nernberg and in favor of Seymour A. Sikov, Esquire, because of the frivolous and vexatious conduct of Nernberg in continuing to file frivolous papers to include an Emergency Application for Special Relief.

On page 10 of his Petition, Nernberg makes two (2) mis-statements, as follows:

1) That he did not have notice of the hearing before Judge Bigley before whom an appropriate Order of Court was sought, this pursuant to local rules, to order the surety to pay Dr. Ludmer his verdict, interest and costs -- notice in writing was given to Nernberg the day before the hearing was held, and he chose not to attend;

2) That there was no hearing on the imposition of costs -- Nernberg wrote counsel for Dr. Ludmer on December 7, 1995 (See respondent's Appendix 5a) advising that there was no

necessity for holding a hearing which had been ordered by the Supreme Court of Pennsylvania by Amended Order dated December 4, 1995 before Judge Bigley, Nernberg paying counsel fees and expenses to the undersigned as Attorney for Dr. Ludmer pursuant to the appropriate laws of the Commonwealth of Pennsylvania. (See Respondent's Appendix 6a).

ARGUMENT

I. THERE WAS NO RETROACTIVE APPLICATION OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT.

The provisions of the Wrongful Use of Civil Proceedings Act, with particular reference to 42 Pa. C.S.A. §8351, as reiterated in other portions of the Act, set forth the following:

> (a) **Elements of action**. -- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

The Act specifically provides not only a cause of action against a person who "initiates" civil proceedings wrongfully, but also against a person who "continues" said civil proceedings wrongfully. As was specifically set forth by the Supreme Court of Pennsylvania in its decision dated February 3, 1989, same forming part of Petitioner's Petition beginning on page 26a and, therefore, not repeated herein, the Court found that the initiation of a lawsuit is only one element of the cause of action, finding that Dr. Ludmer's cause of action did not accrue until such time as he successfully defeated the Petitioner herein in his attempts to have Ludmer held legally liable; this did not finally occur until the Supreme Court of Pennsylvania denied Nernberg's Petition for

Allowance of Appeal in his claim against Ludmer on September 14, 1983. Each separate action of Nernberg, in essence, constituted the initiation and/or continuation of the civil proceedings against Dr. Ludmer, namely the filing of the appeal to the Superior Court of Pennsylvania following the effective date of the Act, as well as filing a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania some two years following the effective date of the Act. Whether this Court finds that these are separate actions which could constitute "the initiation of civil proceedings", or finds, as the Superior Court and Supreme Court of Pennsylvania found, that these actions constituted a "continuation" of the civil proceedings against the Respondent herein, or finds that Dr. Ludmer's cause of action against Nernberg did not accrue until the underlying case was finally terminated on September 14, 1983, in any event same were not retroactive applications of the Act as claimed by the Petitioner herein.

Counsel for the Respondent has reviewed the decisions of this Court allegedly in support of Petitioner's Petition; a review of said decisions does not reflect that either the factual situation nor the holdings by this Court is applicable to the within factual situation.

As indicated in the lengthy Statement of Facts incorporated herein, this Court must find that there was no retroactive application of a statute of the Commonwealth of Pennsylvania and, accordingly, should dismiss or deny Petitioner's Petition.

II. THE PETITIONER FAILED TO FILE HIS PETITION FOR WRIT OF CERTIORARI WITHIN THE APPROPRIATE TIME LIMITATIONS PERMITTING SAID PETITION.

If this Court finds any merit whatsoever in the position taken by Petitioner, it must also find that the Petitioner failed to file his Petition for Writ of Certiorari to this Court within the applicable time limitations.

The provisions of 28 U.S.C.S. §2101 and §2104 set forth that any appeal or any Writ or Certiorari to review the judgment of a state court must be filed within ninety (90) days after the entry of such judgment or decree. The decree permitting the action of Dr. Ludmer to proceed against Nernberg pursuant to the provisions of the Wrongful Use of Civil Proceedings Act was entered on February 3, 1989. (See page 26a of Petitioner's Petition). Accordingly, as the action to proceed by Dr. Ludmer against Mr. Nernberg was allowed by the Supreme Court of Pennsylvania on that date, the ninety (90) day period began to run on that date. It is apparent that the present Petition was not filed within ninety (90) days from that date.

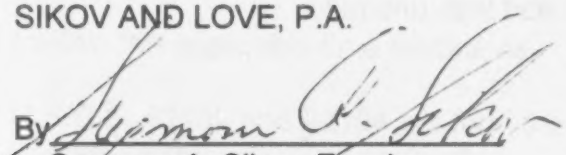
In the event that this Court finds a later date to be applicable, the latest date that could be applicable would be the date that the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal filed by Petitioner herein from the Judgment entered against him in the action filed by Dr. Ludmer against Nernberg at No. GD79-6085 in the Court of Common Pleas of Allegheny County, Pennsylvania, that decision denying allocatur having been entered on July 21, 1995. Once again, the Petition herein was filed more than ninety (90) days from that date and was untimely.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari by Petitioner on his own behalf granting, as did the Supreme Court of Pennsylvania in its Order of December 4, 1995, the right of Respondent herein to apply for reasonable counsel fees to the trial court pursuant to the applicable laws of the Commonwealth of Pennsylvania.

Respectfully submitted,

SIKOV AND LOVE, P.A.

By 
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